Date: 20070813

Docket: IMM-343-07

Citation: 2007 FC 836

OTTAWA, Ontario, August 13, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

NADIATH RADJI
LEYLA APITHY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an immigration officer (the "Officer"), dated December 14, 2006, wherein the Officer determined that there are no humanitarian and compassionate (H&C) considerations justifying an exemption from the requirement to apply for permanent residence from outside of Canada. The applicants are also contesting in a separate application to this Court the Pre-Removal Risk Assessment (PRRA) decision rendered by the same immigration officer on the same date.

[2] Nadiath Radji, the principal applicant, is a citizen of Benin. Her daughter Leyla Apithy, a citizen of the United States, is the other applicant. The principal applicant is a Muslim. She fears her family because they allegedly tried to force her into a marriage and because of the fact that she had a Christian boyfriend. In 2002, the applicant followed her boyfriend to the U.S. While in the U.S. the applicant became pregnant. Shortly thereafter the applicant and her boyfriend began having problems and the applicant moved alone to Chicago where she gave birth to her daughter. Several months after the birth, the applicant left with her daughter for Benin. She alleged that while in Benin her mother threatened to poison her and her daughter. As a result of this incident, they returned to the U.S. The applicants arrived in Canada from the United States on January 6, 2004 and claimed refugee status upon arrival. In a decision dated October 7, 2004, the Refugee Determination Division of the Immigration and Refugee Board (the "Refugee Board") denied the applicants' claim on the grounds that the principal applicant was not credible and had no subjective fear.

[3] The applicants made a motion for a stay of removal but this motion was refused on January 31, 2007. Shortly after learning that she was to be deported the applicant had to be hospitalized due to concerns about her mental health. Consequently, the applicants were not removed. The applicants filed an appeal of the decision denying their application for a stay of removal which was quashed by the Federal Court of Appeal for lack of jurisdiction.

THE DECISION UNDER REVIEW

[4] The applicants requested H&C relief on a number of grounds. First, they submitted that the principal applicant would be at risk in Benin because her family is still angry with her. Second, the

applicants submitted that the status of women in Benin is low and that consequently they are at risk of violence. Third, they argued the minor applicant would be subjected to female genital mutilation in Benin. Finally, the applicants claimed that their degree of establishment in Canada warrants H&C relief.

[5] To support her allegations of risk, the principal applicant submitted seven letters. Two of these letters were before the Refugee Board. Of the five new letters, three were from health professionals. These letters indicate that the principal applicant has severe depression with suicidal tendencies and that her problems stem from her rejection from her family and her abandonment by her ex-boyfriend. The letter from Dr. Renée Pelletier indicates that the primary applicant's condition has improved greatly. The Officer concluded that while these letters indicate that the primary applicant suffers from some psychological problems they are not evidence of the risks alleged by the applicant. The remaining two letters are personal letters: one from the applicant's sister and the other from an acquaintance of the applicant's. The Officer concluded that these letters were from individuals not disinterested and, consequently, gave them little probative value.

[6] With respect to the principal applicant's allegation about forced marriage, the Officer noted that a law was passed in 2004 which prohibits forced marriage yet it remains a problem in Benin. She went on to conclude that the applicant had not proven that she is at risk of forced marriage. The Officer considered the status of women in Benin and noted that according to a report presented at the United Nations there has been a decisive improvement in the promotion of women's rights in Benin. She also referred to documentary evidence which indicates that Muslim Yorouba women

who have children out of wedlock risk temporary expulsion from their family homes if they do not marry.

[7] Although the applicants' submissions did not directly raise the issue of whether the applicant's mental health puts her at risk, the Officer addressed this issue and held that mental health services would be available to her in Benin noting that there is a psychiatric hospital in the area where the applicant previously lived in Benin.

[8] With respect to the risk allegations relating to the minor applicant, the Officer noted that the applicant had provided no evidence to support the allegation that she would be at risk of female genital mutilation if she returned to Benin. The Officer noted that although there is now a law which prohibits female genital mutilation in practice the government has not succeeded in completely eradicating the practice. The Officer also referred to an IRB Request for Information document that cited the assistant executive secretary of the Benin chapter of the l'Organization Femmes, Droit et Développement en Afrique as stating that Benin was in a period of transition with respect to this practice and that there was currently an education campaign to inform people about the new law. According to the documentary evidence approximately 17% of women in Benin have been subjected to female genital mutilation and that 70% of women from the Bariba, Yoa-Lokpa and Peul ethnic groups are subjected to it. The Officer noted that the applicant is not from one of these groups. She concluded that the applicant had not established that her daughter is at risk of female genital mutilation.

[9] The Officer then went on to consider the best interests of the child. The Officer considered benefits which Leyla had enjoyed while in Canada, including her participation in a program called "Devenir grand ensemble" and her participation in the Boys and Girls Club of Lasalle. She found that there was every indication that Leyla is a well-adjusted child. She also noted that Leyla would face less hardship being removed now because she is not yet of school age. She noted that Leyla had travelled extensively and that there was nothing to indicate that Leyla had not adapted well to these moves. In addition, she noted that Leyla had spent over a year in Benin. The Officer noted that Leyla is an American citizen but that she would be able to acquire citizenship in Benin since her mother is a citizen of Benin. The Officer concluded that Leyla's best interests lie with staying with her mother and that removal to Benin would not be contrary to her best interests.

[10] Finally, the Officer considered the principal applicant's degree of establishment in Canada. She noted that the applicant was employed, that she had no family in Canada but had many friends, that she has excellent French ability and that she is motivated to improve herself.

ISSUES

[11] The applicant raised the following questions:

1. Whether the Officer erred in her determination of the best interests of the child?
2. Whether the Officer's decision with respect to the applicant's degree of establishment and integration in Canada was unreasonable?
3. Did the Officer breach the duty of procedural fairness owed to the applicant by unilaterally consulting and relying upon documentation found on the internet to which the applicants were not given a chance to respond to?

ANALYSIS

Best interests of the child

[12] In *Hawthorne v. Minister of Citizenship and Immigration*, 2002 FCA 475, the Federal Court of Appeal held at paragraph 31 that an H&C decision will be found to be unreasonable if the officer was dismissive to the best interests of the child and was not “alive, alert and sensitive” to the best interests of the child.

[13] The applicant submits that the Officer erred by failing to weigh the hardship caused by removal with other factors and instead simply concluded that the degree of hardship of removal would not constitute unusual or undeserved hardship. The applicants cite the following passage from *Hawthorne*:

> To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations that militate in favour of or against the removal of the parent. (para.6)

[14] The respondent submits that the Officer properly weighed the hardship that Leyla might face if removed from Canada with other pertinent considerations and did not, as the applicants suggest, disregard the negative impacts because they did not amount to undue hardship.

[15] In my view, a failure to expressly weigh the likely degree of hardship caused by removal against other factors is not a reviewable error where the Officer examined the best interests of the child with a great deal of attention as required by *Legault v. Minister of Citizenship and Immigration* (2002), 212 D.L.R. (4th) 139 at para. 30 (C.A.) and gave substantial weight to the best interests of the child as required by *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817 at para. 75. Moreover, the majority in *Hawthorne* held that there is no set formula that H&C officers must use when examining the best interests of the child. At paragraph 7, Justice Décary stated:

> The administrative burden facing officers in humanitarian and compassionate assessments - as is illustrated by section 8.5 of Chapter IP 5 of the *Immigration Manual* reproduced at para. 30 of my colleague's reasons - is demanding enough without adding to it formal requirements as to the words to be used or the approach to be followed in their description and analysis of the relevant facts and factors. When this Court in *Legault* stated at paragraph 12 that the best interests of the child must be "well identified and defined", it was not attempting to impose a magic formula to be used by immigration officers in the exercise of their discretion.

[16] Finally, I find that the majority's conclusion in *Hawthorne* does not state that the failure to expressly weigh the hardship caused by removal with other factors is a reviewable error. The Court held:

> [11] I would dismiss the appeal and answer the certified question as follows:
>
> Q.: Is the requirement that the best interests of children be considered when disposing of an application for an exemption pursuant to subsection 114(2), as set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, satisfied by considering whether the removal of the parent will subject the child to unusual, undeserved or disproportionate hardship?

> A.: The requirement that the best interests of the child be considered may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.
>
> (emphasis added)

[17] Applying *Hawthorne* in the present case, the Officer was required to consider the degree of hardship that Leyla would be subject to if she was removed to Benin. This is quite clearly what the Officer did and I find that she did not improperly assess the best interests of the child.

[18] The applicant also submits that the Officer's decision with respect to the best interest of the child is unreasonable because it fails to examine the impact of the applicant's mental and psychological fragility on her daughter, as well as the effects of deportation, interruption of continuity of care and removal from the present stable environment on the applicant's daughter and her mother's capacity to care for her. The respondent submits that the applicants in their H&C application did not allege that the primary applicant's mental health was so fragile that her removal from Canada could potentially lead to a serious deterioration in her mental health or her ability to look after her child. In an H&C application, the burden is on the applicant to raise any issue she wishes to be considered and to bring forth evidence to support her submission. I would note that the evidence before the Officer indicated that that the applicant's mental health condition was improving but still, nevertheless fragile.

Degree of establishment

[19] The Officer considered the primary applicant's work, language, abilities, efforts at self-improvement, family ties, community involvement and volunteer work.

[20] The applicants submit that the Officer's decision with respect to the applicant's degree of establishment was unreasonable because the Officer failed to consider the hardship that would ensue as a result of displacing the applicant from her present environment and interrupting the continuity of her medical and psycho-social care.

[21] The Officer considered all the relevant factors with respect to the primary applicant's establishment and it was open to her to determine that the applicant's level of establishment is not such that to leave would cause unusual or undeserved hardship.

Unilateral consultation of the internet

[22] The applicant submits that the Officer relied on seven documents in rendering her decision and that the Officer's failure to disclose these documents to the applicants breached the duty of procedural fairness owed to the applicant. The applicants raised this issue in the application for judicial review of the PRRA decision rendered by the same officer on the same day as the H&C decision. In my reasons for that application (IMM-342-07), I reviewed the jurisprudence with respect to the duty to disclose documents with specific reference to documents taken from the internet, including the Federal Court of Appeal's decision in *Mancia v. Minister of Citizenship and*

Immigration, [1998] 3 F.C. 461 (C.A.) and this Court's decision in *Zamora v. Minister of Citizenship and Immigration*, 2004 FC 1414. I concluded that where an immigration officer relied on a document from a non-standard site, i.e. a site not regularly consulted by immigration officers or the IRB such as Amnesty International or the U.S. Department of State, and the document is not available in the IRB Documentation Centre, then there is a duty to disclose such a document to the applicant if the document is novel and significant and the evidence indicate changes in country conditions that may affect the decision.

[23] The seven documents relied on by the Officer in making her determination on the applicants' H&C application which the applicants claim should have been disclosed to them are:

1. Internet site of WiLDAF/FeDDAF – Afrique de l'Ouest: Femme Droit et Développement en Afrique
2. Rapport alternatif au Comité des Nations Unies des droits de l'enfant sur la mise en œuvre de la Convention relative aux droits de l'enfant au Benin prepared by the World Organisation against Torture
3. Article from Inter Press Services Agency entitled Droits-Bénin: un ancien praticien abandonne l'excision et veut sensibiliser les réticents
4. Internet site of l'Association des Femmes Juristes au Bénin
5. Benin Development Gateway
6. An article from Le Républician entitled "Les patients de centre psychiatrique Jacquot honorés hier" available on-line
7. "Couverture sanitaire à Cotonou" from the website of the city of Cotonou

[24] While the address of the first website listed, WiLDAF/FeDDAF, was not included on the Exhibits List for the IRB kit on Benin, a document by this organization is on the Exhibits List (see Exhibit A of the affidavit of Jordan Toope). Moreover, the website address is listed under references in the IRB Request for Information document on female genital mutilation in Benin. Therefore, I conclude that this information was available to the applicant. Of the remaining documents and sites, none is from a standard website and none were listed on the Exhibits List for the IRB kit on Benin.

[25] Documents #2-4 contain no information that was not already contained in any of the documents available to the applicants in the Benin kit available at the IRB Documentation Centre. The fifth document contains general information about the development of health programming in Benin but contains no information relevant to the applicant's case because it does not discuss whether mental health care is widely available. The final two documents appear to be significant according to the Officer's decision since she relied on them in coming to the conclusion that the applicant would be able to receive mental health services in Cotonou, the city where the applicant lived in Benin. Although the Officer appears to have found the information from theses sites to be significant, I am not convinced that these documents are significant. The article from *Le Républician* discusses a ceremony held at the Centre National Hospitalier Psychitrique Jacquot on the International Day of Mental Health. It discusses the Benin government's commitment to mental health issues but does not indicate whether mental health services are widely available. The last document, entitled "Couverture sanitaire à Cotonou", is no longer available at the address indicated in the Officer's decision and, unlike the other documents relied on by the Officer, is not included in the Certified Tribunal Record. As a result it is impossible to verify the information on this site.

Despite the questions that remain about the relevance of these documents, the fact remains that the Officer relied on these documents in determining that mental health services would be available in Benin. For this reason, I conclude that the Officer breached the duty of procedural fairness owed to the applicants by failing to disclose these documents to the applicants.

[26] The respondent submits that should the Court find that there was a breach of procedural fairness then the Court should not intervene because the result would have been the same. The respondent cites *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, wherein the Supreme Court of Canada ruled that "a court may exercise its discretion not to grant a remedy for a breach of procedural fairness where the result is inevitable." The respondent submits that the result was inevitable because the applicants failed to meet their burden to establish that their individual circumstances are sufficient to warrant an exemption.

[27] I agree with the respondent. The applicants made a significant number of claims but failed to bring forth evidence to support these claims. As the respondent noted, the applicants brought forward no evidence regarding the conditions for women in Benin, forced marriages, female genital mutilation and the availability of mental health care in Benin. Had the applicant believed that she deserved H&C relief because her mental health condition and that a return to Benin could affect her to the point that her daughter was at risk, then she should have raised this issue in the submissions and adduced evidence to support it. Given that the burden is on the applicant in an H&C decision to establish that there are circumstances warranting H&C relief and the applicants failed to bring forth evidence to support their claims, I find that this is an appropriate case for the Court to exercise its

discretion not to allow the judicial review despite the fact that the Officer breached the duty of procedural fairness.

[28] The applicants filed an application for a stay of a removal order. This application for stay was heard and denied by Mr. Justice Shore. An application for stay will only be granted if the following elements are clearly shown to exist:

1) an arguable case
2) irreparable harm
3) the balance of convenience is in favour of the applicants

[29] I am satisfied, after reading the reasons issued by Mr. Justice Shore that had he found from the evidence presented that the applicant would suffer harm if removed from Canada, harm of a severe nature or irreparable in nature, he surely would have granted the application for stay.

[30] I am satisfied that, in denying the H & C application, the immigration officer properly considered all the elements necessary.

[31] The application for judicial review is denied.

[32] The applicants filed the following question for certification in both IMM-342-07 and IMM-343-07:

> "Under what condition does the unilateral consultation of the Internet by an Immigration Office rendering decision on an humanitarian and compassionate application or a pre-removal risk assessment application constitute a violation of procedural fairness, where unilateral consultation of the Internet is understood to signify the consultation of documents found on the Internet without providing the applicant(s) an opportunity to comment thereupon?"

[33] Without repeating what the respondent states in its written submissions of July 31, 2007, I agree with the respondent as to why the above question need not be certified.

[34] I am satisfied that the proposed question is not determinative of the present issues as, even if the officer considered documents obtained from the Internet, the officer's decision clearly show why she refused the H & C application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-343-07
STYLE OF CAUSE:	NADIATH RADJI, LEYLA APITHY v. MCI
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DATE OF HEARING:	July 25th, 2007
REASONS FOR JUDGMENT:	Honourable Max M. Teitelbaum
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